

2 October 1978

MEMORANDUM FOR THE RECORD

SUBJECT: Presidential Privacy Initiative

REFERENCE: Ltr to Rick Neustadt, Department of Commerce,
dated 15 August 1978 (DDA 78-2967/1)

1. On 13 September I received a telephone call from Ms. Stacy Dean in the Office of Consumer Affairs. I returned the call on 14 September and learned that Ms. Dean had been tasked to work on the various Agency comments on that part of the Presidential Privacy Initiative which bore upon the question of electronic funds transfers (EFT). EFT was the subject of Section 4B of the draft Presidential Privacy Initiative. As one of its decision issues the draft asked: "Should the Federal Government withdraw from, or restrict its operations of, EFT services for the private sector?" We had answered that question, after consultation with [REDACTED] in the Office of Finance, by voting for the decision option which read: "Do not limit government operation of EFT for the private sector at this time." In recommending this option we had suggested, again at OF's urging, the deletion of the qualifying "at this time."

2. Ms. Dean said that our position had caused something of a stir in her office and among others working on the Initiative because they were assuming our comment implied an Agency intention to use government EFT records as a source of intelligence information. I assured Ms. Dean that nothing could be farther from the truth, that we had no interest in nor need for the kind of information which would accrue on American citizens in an EFT system, and that even if we had an interest we had no charter for its collection. I told her that our position was based upon a desire to ensure that the services of EFT, which we had found very useful in our financial transactions, continued to be available and that our deletion of the words "at this time" merely reflected a desire to eliminate the implication that something was wrong with EFT which needed correcting in the future.

3. Ms. Dean accepted my explanation and seemed quite relieved to have obtained it. She said that if there were any further questions she would call me back, but apparently there were none as I heard nothing further from her.

4. On 18 September I had another conversation with Ms. Leslie Greenspan at OMB. Ms. Greenspan had been tasked to work on that portion of the Initiative which dealt with the Privacy Act. She had initially called [REDACTED] in IPS; Dan had transferred her call to me. Ms. Greenspan forwarded a restatement of the issues as they affect the administration of the Act, and I promised to review these and call her back, which I did on 19 September. The restated issues are attached. 25X1A

5. I told Ms. Greenspan that I had no trouble with the policy position being presented by OMB as a consensus of the agencies consulted, with one exception. On the issue "should administration of the 'routine use' provision of the Act be substantially strengthened?", I took issue with the flat statement in Option 3 that agencies should conduct "a responsive public involvement program." I pointed out that an agency like this faces significant limitations in the ways in which it can involve the public in its administration of the Privacy Act, and that those limitations are themselves imposed by statute. I urged the addition of the qualifying phrase "within the limits imposed by other applicable laws." Ms. Greenspan saw the logic of my position and agreed to try to insert the qualifying language. Subsequently, she sent me a copy of a revised version of the agreed-upon option containing the phrase, "consistent with applicable law." STATINTL



Attachment: a/s

cc: OGC [REDACTED]

Distribution:

Orig - DDA Subject (via DDA)
1 - OGC [REDACTED]
1 - AI Chrono

September 18, 1978

Issue - Should the head of each agency be asked to designate a person responsible for overseeing the agency's administration of the Privacy Act

Current OMB policies assign agency heads responsibility for establishing internal agency procedures and responsibilities for administering the Privacy Act consistent with guidelines issued by OMB. There are significant variations in the procedures and responsibilities established by various agencies - some are very structured and centralized whereas others are more decentralized.

The Privacy Commission found that agencies which experienced the greatest success in implementing the Privacy Act had established formal mechanisms to deal with its requirements. The Commission believed that a critical element in this approach was the designation of one responsible official with authority to oversee the Act's implementation, and the Commission therefore recommended designation of such an official in every agency. This official's responsibilities would include: (1) issuing any instructions, guidelines, or standards necessary to implement the Privacy Act; (2) assuring the consistent application of regulations and policies within the agency; and (3) providing for the effective education of system managers and decision makers who are responsible for the collection, maintenance or disclosure of personal information.

Pros:

- Increases importance, visibility and awareness of privacy responsibilities.
- Facilitates communications on privacy matters.
- Would speed up implementation of central policy direction such as OMB's proposed matching guidelines.
- Would establish center of expertise to assist in training and effective implementation of the Act.
- Would result in more uniform implementation of the provisions of the Act.

Cons:

- Diminishes agency head discretion.
- Because of cross-cutting nature of privacy concerns, the establishment of a single person responsible for privacy could diminish responsibility and accountability of agency program and functional managers for assuring compliance with the Act.

Decision

There is general agreement among the agencies, Domestic Policy Staff and OMB that it would be desirable to require agencies to designate a single person responsible for overseeing the administration of the Act. OMB is revising OMB Circular No. A-108 to implement this requirement. No Presidential decision is considered necessary.

September 18, 1978

Issue - Should agency oversight procedures for developing new systems involving personal data be reformed?

Federal agency decisionmaking processes for the design of personal data systems and the procurement of computers and communication capacity for such systems have been severely criticized. It is argued that these decisions too often are made at the operations level, with inadequate policy oversight and consideration of privacy. Considerable time, money, and effort have been spent in recent years designing automated recordkeeping systems which have subsequently been halted in the final stages of development when OMB, GSA, Congress or the public have discovered a lack of privacy considerations. In addition to the costs incurred, this eleventh-hour delay or cancellation of systems frequently leads to the loss of needed information by agencies and causes frustration and lowered morale among those who plan and develop these new systems.

A number of steps have recently been taken to address these problems:

- ° The President's August 31, 1978 memorandum to the heads of executive departments and agencies urged each agency head "to initiate additional efforts during the coming year to reduce the amount of personal information collected and maintained by the Federal Government, to avoid unwarranted disclosure of this information, and to improve the internal management of personal data systems." and asked the Director of the Office of Management and Budget to monitor these efforts and to keep him informed of agency progress.
- ° As a part of the Administration's multi-year budget initiative, OMB is requiring agencies to identify major computer and telecommunication systems acquisitions in the current year, the budget year and four years beyond the budget year. OMB will provide this information to Congress in order to assure earlier opportunities for congressional review of agency plans. The list of acquisitions will also be provided to GSA to assist them in carrying out their procurement control functions.
- ° Internal OMB procedures for reviewing agency FY 80 budget proposals establish stringent criteria for reviewing agency budget justifications for information processing activities. The procedures require a review of agency proposals to assure that they "include a clear indication of the necessity for such data collections and the safeguards the agency will employ to preclude

inadvertent or surreptitious access by unauthorized persons to such data." and that "the acquisition of data processing and telecommunication equipment...be reviewed to assure that the requirements of the Privacy Act (P.L. 93-579) have been met."

- ° A recent OMB policy issuance requires agencies to establish (by November 24, 1978) a computer security program which includes the establishment of agency management control processes for all sensitive computer applications...including those which process personal data. The management control process established by agencies must, as a minimum, provide for defining and approving specifications prior to starting computer programming, conducting periodic design reviews during the design process and conducting and approving system tests prior to using the system operationally; assigning responsibility to assure that specifications for procurement of information processing capacity or services comply with policies; and assigning responsibility for the conduct of periodic risk analyses for each computer installation.
- ° OMB, consistent with recommendations contained in the Third Annual Report of the President on administration of the Privacy Act, recently implemented a procedure to give members of the public a greater opportunity to comment on Federal agency proposals to establish or alter personal data systems subject to the Privacy Act of 1974. A summary of agency proposals to establish or alter personal systems now provided to OMB and the Congress 60 days prior to issuing data collection forms or acquiring computer capacity are being published in the Federal Register and mailed directly to staff of Members of Congress who have indicated an interest in privacy, privacy press and a list of private citizens and groups which have indicated an interest in privacy.

The question, then, is whether the initiatives already taken will adequately address the problems and concerns identified or whether additional measures should be taken.

Options:

1. Carefully monitor the results achieved by the initiatives taken and then take whatever additional measures are necessary and appropriate.

2. Centrally initiate additional efforts to control the design of personal data systems or provide for even earlier public involvement in the design of systems than provided for in the current initiatives.
3. A combination of 1 plus asking agency heads to assign responsibility to the person responsible for overseeing the agency's administration of the Act to suggest additional government-wide reforms when the agency submits its plans for implementing the recent OMB computer security policy and in their annual report on implementing the Act.

Decision

There is general agreement among the agencies that Option 3 be adopted. OMB is revising OMB Circular No. A-108 to implement this requirement. No Presidential decision is considered necessary.

Issue - Should administration of the "routine use" provision of the Act be substantially strengthened?

The Privacy Act requires agencies to inform individuals from whom information is collected of the purposes for which the information will be used and their rights, benefits or obligations with respect to supplying that data.

The Act permits agencies to subsequently establish new "routine uses" of the information for compatible and appropriate societal purposes which may not have been foreseen at the time the system was established. All "routine uses" (those established prior to collecting personal information as well as those subsequently established) are subject to public review and comment.

The Privacy Protection Study Commission considered the "routine use" provisions a major weakness of the Act. They believe it permits agencies great and unintended latitude to disclose personal information while still allowing them to uphold the letter of the law. The Commission advocated a substantial tightening of the "routine use" provision of the Act for two reasons: (1) they feel that agencies have interpreted nearly all external disclosures of information as "compatible with the purpose" for which the information was originally collected; and (2) the clause provides no standards for internal agency disclosures.

In order to correct these problems, the Commission proposed that any "routine uses" established be consistent with the individuals "reasonable expectations of use and disclosure under which the information was provided, collected, or obtained." This standard would enable an individual to measure the subsequent use of his personal information against the expectation he had when he supplied it, as opposed to simply any technically legitimate purpose for which the information might be employed, whatever the original expectations of the individual.

Pros:

- ° Would afford individuals with an increased measure of control over their records.
- ° Would limit inappropriate internal and external disclosures of personal information.

Cons:

- ° Would impose a significant burden on agencies.
- ° A standard based on "reasonable expectations" of various individuals would be difficult to implement and could cause significant legal problems.

- ° Would not address problem of disclosing data which was obtained from third parties rather than the data subjects
- ° Would limit congressionally intended flexibility.

Possible compromise options

Given the latitude provided by the Act, the Administration could adopt the position that agency administration of inter and intra agency transfers of information should be tightened up but not necessarily in accordance with the standard proposed by the Commission. This would provide affirmative Administration action on a major concern expressed by the Commission. The President's August 31, 1978 memorandum to the heads of executive departments and agencies requests agency heads to initiate additional efforts to avoid unwarranted disclosures of personal information and strengthen internal management of personal information already demonstrates Administration concern about this problem. In addition, OMB is currently circulating draft guidelines on the sharing of information between agencies for use in "matching" programs. These guidelines would be a solution to one segment of the "routine use" problems. OMB has also recently taken steps to enhance the opportunities for public scrutiny of agency proposals for new and altered systems -- which include proposed "routine uses" of such information.

Options

1. Revise the "routine use" provision along lines recommended by the Commission.
2. Accept concept of revising "routine use" standards; and request OMB to take additional steps to revise the current OMB guidelines on "routine uses" and inter-agency transfers -- as they are doing in the case of the matching guidelines. This could include the development of more precise definitions of "compatible" as used in the Acts definition of "routine use."
3. Enhance opportunities for increased public scrutiny of agency administration of the routine use provisions and take further steps to require agencies to tighten up on their internal management practices -- by such actions as (a) follow-up by OMB on the President's August 31, 1978 memorandum, (b) asking agency heads to task the individual responsible for overseeing the agencies

administration of the Act to develop specific plans and timetables for enhancing the agency's administration of these provisions of the Act (including the conduct of appropriate training) and assuring that the agency conducts a responsive public involvement program *within the limits imposed by other applicable laws and regulations.*

4. Take no further action beyond the initiatives already underway and rely on OMB to initiate any further actions when necessary and appropriate under their statutory responsibilities for overseeing implementation of the Act.

Decision

There is general agreement that option 3 should be adopted. OMB is revising OMB Circular No. A-108 to implement this option. Both Justice and Treasury have stressed that any new standards which may be developed for routine use should not preclude the transfer of information for legitimate law enforcement and protective purposes. No Presidential decision is considered necessary.

authorized audits or investigations.

Full implementation of the PPSC's recommendation would require amendment of the Privacy Act itself. The effect would be to place Privacy Act requirements on agencies of

corporate grantees and additional contracts not now subject to the Act. Although this approach would eliminate much uncertainty on applicability of the Act, the benefits and impact are not clear. State and local governments, businesses, and universities are already considered to bear a heavy Federal paperwork and regulatory burden and the Administration is seeking ways to lessen this burden.

The General Accounting Office is currently completing a year-long study of this issue and is expected to make recommendations. Additional guidance or criteria on the contractor provision could be developed in conjunction with the GAO findings and recommendations.

Option 1. Extend the Act legislatively as recommended by PPSC.

Pros

- ° Would establish a consistent, uniform standard, thus avoiding the current confusion over what is a grant and what is a contract.
- ° Would enhance the general principle of privacy protection for government-funded recordkeeping.

Cons

- ° Would impose additional burdens and requirements on grantees.
- ° Would add to Federal paperwork in oversight/administration.
- ° Would require legislation, which could be difficult to enact.
- ° No specific need for additional protection has been shown.

Option 2. OMB should review the problems outlined in the forthcoming GAO report, work with procuring agencies to consider any additional guidance that could be administratively implemented and identify any alternative changes in legislation (to that proposed by PPSC) that should be considered.

Pros

- ° Would eliminate confusion as to current coverage/intent of the Act.

- ° Would take advantage of recent study of actual experience under the provision.
- ° Would provide positive Administration response to expected GAO report.
- ° Could result in administrative actions but preclude overcommitment since legislation may be required.

Cons

- ° Delays action.

Option 3. Take no action.

Pros

- ° Would require no additional resources.

Cons

- ° Would not solve the problem of confusion that exists.

Recommendation: In view of the legal questions and complex issues of Federal-State-local relationships and possibly conflicting Administration policies, there is general agreement that option 2 should be selected. OMB will take appropriate action.